S.B. Civil Misc. Appeal No.2284/2007

Smt. Kokila.

vs.

M/s. Sunshine Art Creation.

Date : 26.10.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.Shailendra Kala a/w Mr.Harish Purohit & Mr.Anuj Kala, for the appellant.

Mr.VD Kalla a/w Mr.CS Kotwani, for the respondent.

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Heard learned counsel for the parties.

The appellant is aggrieved against the order dated 4.10.2007 passed by the Additional District Judge (Fast Track) No.3, Jodhpur by which the trial court dismissed the appellant's application filed under Order 9 Rule 13 CPC which was filed for setting aside the judgment and decree dated 14.5.2007.

Brief facts of the case are that the plaintiff/respondent filed a suit for possession on the basis of the plaintiff's title with the allegation that the appellant/defendant, who was

the daughter-in-law of the seller of the property to the plaintiff and who was residing in the annexe of the bungalow encroached upon the entire bungalow in absence of the plaintiff. The plaintiff sought decree for possession as well as mesne profits at the rate of Rs.1,000/- per day.

The defendant submitted written statement in detail and according to the defendant, the suit property was HUF property and, therefore, the defendant's father-in-law etc. had no right to sell the property in dispute. It is also submitted that there were certain matrimonial dispute between the defendant and her husband. Be it as it may be, initially the power was filed on behalf of the defendant in the trial court by learned counsel Mr.Hanwant Singh Balot, then power was filed by learned counsels Mr.Kuldeep Singh Rathore and Mr.Gyaneshwar Choudhary. Learned counsel Mr.Gyaneshwar Choudhary was appearing with learned counsel Mr.Kuldeep Singh Rathore. Thereafter, the power was filed by learned counsel Mr.AR Mehta and along with learned counsel Mr.AR Mehta, learned counsel Mr.Gyaneshwar Choudhary also continued to appear. On 3.4.2006, learned counsel Mr.AR Mehta died. It appears from the order-sheets of the trial court that even after death of learned counsel Mr.AR Mehta, the appearance of advocate

has been recorded in the order-sheets, probably because of reason of appearance of learned counsel Mr.Gyaneshwar Choudhary as is the case of the respondent. At the time of death of learned counsel Mr.AR Mehta, as per the order-sheet, the case was fixed for settlement between the parties. However, ultimately, the issues were framed on 13.3.2007. On the next date i.e. on 17.4.2007, the affidavits of the plaintiff and plaintiff's witnesses were submitted but nobody appeared on behalf of the defendant in the trial court but it appears that in the interest of justice, the trial court did not pass ex-parte order against the defendant on 17.4.2007 and adjourned the case to the next date. On the next date i.e. on 18.4.2007 also, nobody appeared on behalf of the defendant but the Court further adjourned the matter. On 21.4.2007 also nobody appeared for the defendant and the defendant's right to cross examine the plaintiff and his witnesses was closed. Thereafter, the case was adjourned for further evidence of the plaintiff. On 1.5.2007, the plaintiff's evidence was closed and the case was fixed for the evidence of the defendant despite the fact that on 17.4.2007, 18.4.2007 and 21.4.2007, nobody appeared on behalf of the defendant. On 2.5.2007 also, nobody appeared on

behalf of the defendant nor any witness was present, therefore, the defendant's evidence was closed by the trial court. On the next day i.e. on 10.5.2007 only, the trial court passed the order to proceed ex-parte against the defendant and fixed the case for final hearing and on 14.5.2007, the trial court passed the decree for eviction of the defendant and also granted decree for mesne profits at the rate of Rs.1,000/- per day meaning thereby Rs.30,000/- per month.

The appellant/defendant submitted application under Order 9 Rule 13 read with Section 151 CPC on 3.8.2007. In the application, the appellant stated that her advocate unfortunately died on 3.4.2006 and thereafter, the case was transferred to another Court and neither the appellant nor her advocate were given information about the transfer of the case from one Court to another. It is also stated that after the death of learned counsel Mr.AR Mehta, the appellant was not given any information and, therefore, the appellant had no knowledge about the complete facts about the ex-parte proceedings taken by the court below. It is also stated that after the death of learned counsel Mr.AR Mehta, no notice was given to the appellant from her counsel's office. It is also stated that the Court below was also not informed

about the death of learned counsel Mr.AR Mehta nor the Court below issued any notice to the appellant. The appellant submitted that when the decree was sought to be executed and Sale Amin came to his place, then she came to know about the passing of the decree. This brief application is supported by the affidavit of the appellant.

The plaintiff/respondent submitted a detailed reply to the application filed by the appellant and the appellant submitted rejoinder to the reply in the form of affidavit which is in detail and contains several new facts. The appellant also placed on record a receipt by which few files of the appellant were handed over to the appellant by the son of learned counsel Mr.AR Mehta on 5.8.2007. The appellant also placed on record a copy of the notice which was given by learned counsel Mr.Gyaneshwar Choudhary dated 13.8.2007 to appellant wherein serious allegations have been levelled against the appellant and her having short temper and her misbehaviour. The appellant also placed on record copy of complaint which was submitted by her before the Bar Council of Rajasthan by which she complained against learned counsel Mr.Gyaneshwar Choudhary and Mr.Ashok Mehta advocates.

After hearing both the parties, the learned

court below observed that the appellant herself admitted that after death of learned counsel Mr.AR Mehta on 3.4.2006, she met with his son and demanded return of the case file and this happened within 15-20 days of death of learned counsel Mr.AR Mehta. According to the appellant herself, learned counsel Mr.Gyaneshwar Choudhary was also present in the chamber of learned counsel Mr.AR Mehta and she was told that he is junior advocate in the office of learned counsel Mr.AR Mehta. Therefore, according to the learned court below, the appellant had knowledge of death of learned counsel Mr.AR Mehta from the beginning. She also had knowledge that learned counsel Mr.Gyaneshwar Choudhary was her advocate as he was appearing along with learned counsel Mr.AR Mehta. The court below, therefore, reached to the conclusion that the contention of the appellant that learned counsel Mr.Gyaneshwar Choudhary was not appointed by her as her advocate, cannot be accepted. In view of the above, the appellant had full knowledge of all the proceedings taken in the trial court after the death of learned counsel Mr.AR Mehta and learned counsel Mr.Gyaneshwar Choudhary appeared on her behalf. In view of the above reasons, the court below held that since no steps were taken by the appellant in the court

below for 13 months, then she submitted the application after delay and, therefore, there is no sufficient cause for setting aside the ex-parte decree. The court below also took note of the contention of the plaintiff that the suit property is having violation of Rs.82 lakhs and the appellant wants to delay the relief to the plaintiff.

Learned counsel for the appellant vehemently submitted that it is not in dispute that her counsel died on 3.4.2006 and the counsel, who appeared with learned counsel Mr.AR Mehta, in his notice, which was given by him after decision of the suit on 13.8.2007, stated that on 5.6.2006, it is the appellant who told him not to appear in her case, then the finding of the Court below that learned counsel Mr.Gyaneshwar Choudhary represented the appellant in the trial court is absolutely wrong. It is also submitted that the appellant filed the written statement in detail and claimed her title in the property in a suit filed on the basis of tile and, therefore, in that suit, there was not reason for her not to contest the suit. It is also submitted that in the peculiar facts of this case, it is proved from the record of the case itself as well as the documents

placed on record that there may be some allegations and counter allegations and there may be some delay on the part of the appellant in moving the application, but it cannot be said that the appellant suffered a decree knowingly, therefore, the presumption of bonafides should have been drawn.

Learned counsel for the respondent/plaintiff vehemently submitted that from the facts which cannot be disputed, no case for setting aside the decree has been made out. It is an admitted fact that learned counsel Mr.AR Mehta died on 3.4.2006 and the appellant had three advocates – Mr.Hanwant Singh Balot, who filed power on behalf of the appellant on earlier occasion, thereafter Mr.Kuldeep Singh Rathore and along with him, Mr.Gyaneshwar Choudhary appeared and thereafter, Mr.AR Mehta. None of the power of any of the earlier advocates was withdrawn by any of the advocates, therefore, the appellant/defendant was represented by all the advocates. Not only this, learned counsel Mr.HS Balot received the copy of one of the application and that receipt was on behalf of the appellant, therefore, the contention of the appellant that she was not having any knowledge of the proceedings taken before the

court below are absolutely false and only an afterthought and concocted story to deprive the respondent from the fruits of the litigation. It is submitted that the stand taken by the appellant is self contradictory as well as absolutely false. In the application, she stated that she had no knowledge of the death of learned counsel Mr.AR Mehta as she stated that she was not given information about the death of learned counsel Mr.AR Mehta. Whereas in the rejoinder, she clearly stated that she had full knowledge of the death of learned counsel Mr.AR Mehta and she contacted son of learned counsel Mr.AR Mehta after the death of learned counsel and also met with counsel Mr.Gyaneshwar Choudhary. In view of the above reason only, the appellant's application under Order 9 Rule 13 CPC was rightly dismissed. It is also submitted that in the order-sheets when the fact has been recorded that the counsel has appeared on behalf of the appellant, then there is no reason for believing that the counsel did not appear.

It is also submitted that in one of the case reported in 2006 WLC (Raj.) UC 269 (Surajbhan vs. Laxmi Narayan) in identical facts and circumstances, this Court after considering the facts of the case, held that the ex-parte decree

in these facts cannot be set aside. According to learned counsel for the respondent, the case of Surajbhan (supra) virtually applies to the facts of the case in hand.

Learned counsel for the respondent also submitted that it appears that the notice dated 13.8.2007 of appellant's counsel is either concocted or has been obtained by pressure of complaint in Bar Council against the appellant's advocate. In the totality, the appellant was well aware of the proceedings of the court and she did not appear in the Court below deliberately and thereafter suffered decree and thereafter, deliberately submitted the application after delay with ulterior motive of delaying the suit proceedings and execution.

I considered the submissions of learned counsel for the parties and perused the record.

There are serious allegations levelled by the appellant against the learned counsel who alleged to has represented the appellant in the trial court. There is serious allegation of learned counsel also against the appellant. The allegations may be out of some dispute between the party which more appears to be not due to

mishandling of case but due to temperament only, therefore, this Court will like to see that whether the court below was right in rejecting the application of the appellant uninfluenced by the allegations and counter allegations because of the reason that the appellant's contention is that her advocate died on 3.4.2006 and thereafter, ex-parte decree was passed against her on 14.5.2007 and she moved application for setting aside the decree on 3.8.2007.

The death of learned counsel Mr.AR Mehta is not in dispute. It is also not in dispute that learned counsel Mr.Gyaneshwar Choudhary was appearing with senior advocate, earlier with learned counsel Mr.KS Rathore and thereafter with learned counsel Mr.AR Mehta. Therefore, so far as the contention of the appellant that her counsel who was conducting her case was learned counsel Mr.AR Mehta cannot be disputed. So far as not obtaining the permission of the court for appearance of another advocate when other advocate already filed power on behalf of the appellant is concerned, that was never objected by the respondent in the trial court during the entire trial. If that contention of the learned counsel for the respondent is accepted, then learned counsel Mr.HS Balot was the advocate for the

appellant and he also did not withdrew the power nor the court granted any permission of withdrawal of his power, then learned counsel Mr.AR Mehta could not have appeared. But that fact is absolutely irrelevant as nobody is disputing the appearance of learned counsel Mr.Mehta on behalf of the appellant and learned counsel Mr.Choudhary with him. A notice was given by learned counsel Mr.Gyaneshwar Choudhary to the appellant wherein it is mentioned that the appellant after the death of learned counsel Mr.AR Mehta specifically instructed learned counsel Mr.Choudhary not to appear on behalf of the appellant in the present case in the trial court.

It may be true that there may not be substance in the allegations levelled against each other but it appears that looking to the stakes involved in the property as well as in view of the fact that the appellant engaged more than three advocates and filed the written statement and claimed some right or interest in the property, it cannot be believed that she would have not taken any steps to contest the suit. In the totality of the circumstances, ignoring all other allegations and counter allegations which may not have affected the case, a lenient view could have been taken by the trial court because of the fact that the

decree was passed on 14.5.2007 and the appellant submitted application for setting aside of the decree on 3.8.2007. Admitting for the sake of arguments that the appellant had knowledge of the death of learned counsel Mr.AR Mehta, then it appears that the appellant was in touch with the advocates if the stand of the appellant as well as her counsel is accepted, then also, it cannot be said that she was in touch with her advocate for not contesting the case. The normal presumption is that she must have been in touch with the advocates to contest the case and there must have been some reason for her not appearing in the Court personally to watch the court proceedings. Apart from the above, in the trial court, there is no application that learned counsel Mr.AR Mehta died and further the trial court also did not pass the ex-parte order before 10.5.2007 even when nobody appeared on behalf of the appellant. In view of the peculiar facts of the case, I do not find that the facts of the case in hand can be equated with the case of Surajbhan (supra). Each case is required to be decided according to the facts of each case.

In view of the above reasons, the appeal deserves to be allowed, hence, allowed and the

order of the court below dated 4.10.2007 is set aside.

At this stage, learned counsel for the respondent submitted that the trial court be directed to decide the suit expeditiously and in view of the allegations and counter allegations, it appears that there may not be very congenial atmosphere in the trial court unless the parties and particularly, the appellant remain cool and calm because there are several allegations which appear to be not of good temperament. Therefore, it is expected from the appellant that she will cooperate in deciding the case by the trial court expeditiously.

In view of the above, the trial court is directed to decide the suit within a period of one year from the date of receipt of the copy of this order.

Both the parties are directed to appear before the trial court on 14.11.2007.

(PRAKASH TATIA), J.

S.Phophaliya